(1) Supreme Court, U.S.
FILED

NO. 99187 5 MAY 22 2000

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MARK ST. ROMAIN AND ANGELA ST. ROMAIN

Petitioners,

VERSUS

SUPERIROR WELL SERVICE, INC.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LOUIS R. KOERNER, JR., ESQ.
OF THE LOUISIANA BAR
1204 JACKSON AVENUE
NEW ORLEANS, LA 70130-5130
(504) 581-9569 FAX: (504) 566-0546
ATTORNEY FOR PETITIONER

68pp

QUESTIONS PRESENTED

Does "common control" establishing a "fleet of vessels" for Jones Act purposes mean actual control or can an employer, who exercises actual control over the fleet of vessels, avoid having "common control" by means of structuring its contractual relationships so that that contractual control of the vessels is stated to remain with the customers and navigational control with the vessel owner?

May the claim of an offshore worker against his employer that he is a seaman and the member of the crew of a fleet of jack-up boats be denied by summary judgment when these vessels, on which the worker spent far more than the required 30% of his time, were under the actual control of the employer's offshore supervisor and played an integral part in the performance of plug and abandonment services for owners of offshore platforms in the Gulf of Mexico because less than half of these vessels were chartered by the employer and the remainder were chartered by customers of the employer?

May a court of appeal deny the use of a test of actual common control over a fleet a vessels because it would "involve the court in analyzing the day-to-day minutiae of a liftboat's operations," and "rather, resort to developed workable standards for determining who qualifies as a seaman under the Jones Act," which are tests that, in this set of facts, make contractual form determinative over substance and establish an easily manipulatable test that elevates contractual form over the actuality of common control?

PARTIES TO THIS PROCEEDING

Petitioners are Mark and Angela St. Romain, ("St. Romainr"), plaintiffs in the district court and appellants in the court of appeal.

Respondent is Superior Well Services, Inc., who was a defendant in the district court and appellee in the court of appeal.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THIS PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
GROUNDS FOR JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	4
I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT, THOSE OF OTHER CIRCUITS, AND DECISIONS OF THE SUPREME COURT AND COURTS OF APPEAL OF LOUISIANA	4
II. THE QUESTIONS ARE IMPORTANT	6
III. AN ACTUAL-CONTROL TEST WILL PRODUCE FAIR AND CONSISTENT RESULTS	9
A. The "Actual-Control" Test	9
B. Doctrinal and Jurisprudential Support for the "Actual Control" Test	10
C. Application of the "Actual-Control" Test to the Facts of this Case	14
CONCLUSION	19
CERTIFICATE	20

TABLE OF AUTHORITIES

CASES:

Adams v. Bill Laurence, Inc., 1999 U.S. Dist. LEXIS 270 (E.D. La. 1999)	11
Ardoin v. J. Ray McDermott & Co., 641 F.2d 277 (5th Cir. 1981)	13
Bach v. Trident Steamship Company, 920 F.2d 322 (5th Cir. 1991)	12
Bertrand v. International Mooring & Marine, Inc., 1984 AMC 1740, 700 F.2d 240 (5 Cir. 1983), cert. denied, 464 U.S. 1069, 104 S.Ct. 974, 79 L.Ed.2d 212 (1984)	5
Chandris v. Latsis, 515 U.S. 347, 366, 115 S.Ct. 2712, at 2189; 132 L. Ed. 2d 314 (1995)	4, 8, 9, 13
Coulter v. Texaco, 714 F.2d 467, 469 (5th Cir. 1983)	14
Etheridge v. Subsea International, Inc., 806 F.Supp. 598, 602 (E.D. La. 1992)	17
Fisher v. Nichols, 81 F.3d 319, 323 (2d Cir. 1996)	5
Foster v. SubSea International, Inc., 1998 U.S. Dist. LEXIS 11725, *9-10 (E.D. La. 1998)	13
Foulk v. Donjon Marine Co., Inc., 144 F.3d 252 (3rd Cir. 1998)	5, 13

Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 560, 137 L. Ed. 2d 800, 117 S. Ct. 1535, 1543 (1997)	4, 13
Langston v. Schlumberger Offshore Services, Inc., 809 F.2d 1192, 1193-94 (5th Cir. 1987)	10, 11,15
Pederson v. Powell-Duffryn Terminals, 34 F.Supp.2d 915, *10-11 (D.N.J. 1999)	13
Shade v. Great Lakes Dredge & Dock Co., 154 F.3d 143, 154 (3d Cir. 1998)	5
Wallace v. Oceaneering International, 727 F.2d 427, 434 (5th Cir. 1984)	14
Wisner v. Professional Divers of New Orleans, 98-1755 (La. 3/2/99), 731 So. 2d 200	6
Wood v. Subsea International, Inc., 99-1320 (La.App. 4 Cir, 05/03/00); 2000 La. App. LEXIS 1074	5, 8
STATUTES:	
46 U.S.C. § 588(a)	1
OTHER AUTHORITY:	
Caffrey, Comment, Splicing the Net: A Legislative Answer to the Problem of Seaman Status under the Jones Act, 14 Mar. Law. 361 (1990)	14
Maloz, Harbor Tug & Barge Co. v. Papai: The United States Supreme Court Takes a Fleeting Glance at Jones Act Seaman Status, 72 Tul. L.	19

Rev. 2227, 2238 (June, 1998)	
Matison, Note: Compulsory River Pilots Granted Jones Act Status – Sounding the Death Knell of the "Fleet Doctine": *Evans v. United Arab Shipping Company*, 16 Mar. Law. 421 (1992)	12
Morrison, The Fifth Circuit's Identifiable Fleet Requirement for Seaman Status under the Jones Act, 31 Willamette L. Rev. 53 (1995)	5
Powell, Note: A New Highlight on an Old Doctrine and the Evaporation of the Fleet Rule: *Munguia v. Chevron U.S.A., Inc.*, 10 Mar. Law. 326 (1985)	14
Robertson, A New Approach to Determining Seaman Status, 64 Tex. L. Rev. 79 (1985)	14
Robertson, Rubin: A Glimpse at His Contributions to the Law, 52 La. L. Rev. 1527, (1992)	12
Rosamond, Note, an Employer's Common Ownership or Control over Several Vessels Is Unnecessary for Recovery under the Jones Act, 8 Mar. L. 398 (1993)	5
Wohlgenmuth, "Seaman" Status and the Jones Act: *Bach v. Trident Steamship*, 17 Mar. Law. 115 (1992)	12

TABLE OF APPENDICES

Appendix A – Opinion of the United States Court of Appeals for the Fifth Circuit dated and filed February 22, 2000 203 F.3d 376, 2000 U.S. App. LEXIS 2512, 2000 A.M.C. 860 (5th Cir. La. February 22, 2000). 1a

Appendix B -- Minute Entry of the United States District Court, dated September 10, 1997, 1997 U.S. Dist. LEXIS 14208. (1998 U.S. Dist. LEXIS 3734, 1998 AMC 1919 (E.D. La. March 20, 1998) (App D). 10a

Appendix C – Order and Judgment of the United States District Court, dated March 20, 1998 and entered on March 23, 1998, 1998 U.S. Dist. LEXIS 3734, 1998 AMC 1919. 13a

Appendix D – Final judgment of the United States District Court dated September 16, 1998 and entered on September 17, 1998. 24a

Appendix E – Transcript of oral argument of March 11, 1998. 25a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The decision of the Fifth Circuit (App. A) is reported at 203 F.3d 376, 2000 U.S. App. LEXIS 2512, 2000 A.M.C. 860 (5th Cir. La. February 22, 2000). The district court opinions (App. B-C) are reported at 1997 U.S. Dist. LEXIS 14208 (E.D. La. September 10, 1997) (App. B) and 1998 U.S. Dist. LEXIS 3734, 1998 AMC 1919 (E.D. La. March 20, 1998) (App D).

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. §§ 1254(1), 2101(c). The United States Court of Appeals for the Fifth Circuit rendered the decision below on February 22, 2000. There was no application for rehearing.

STATUTE INVOLVED

46 U.S.C. § 688(a) reads as follows:

Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any

seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Petitioner, Mark St. Romain, claims to be a seaman and a member of the crew of a fleet of jack-up barges which his employer, Superior Well Service, Inc., used to perform plug and abandonment services under contract to the owners of offshore platforms in the Gulf of Mexico. These jack-up barges, on which St. Romain spent far more than 30% of his time, were under the actual control of the Superior offshore supervisor, whether chartered by Superior or Superior's customer.

A. The Consequences of the Decision Below

The decision of the Fifth Circuit unfairly denies seaman status to offshore workers who have been assigned to a fleet of vessels under the actual common control of the employer because the employer and the employer's customers have chosen a written contractual relationship in which the charter party is in the name of the customer because of a disinclination to become involved in "minutiae" and so permits contractual form to become elevated over the reality of common control.

B. Proceedings Below

On March 4, 1995, plaintiff suffered an accident while working on a stationary platform owned by Marathon, while employed by Superior on the Outer Continental Shelf offshore of Louisiana under circumstances in which the accident was caused by the failure of a heavy metal spreader bar designed by Superior and by Industrial Fabrication and Repair Service, Inc. ("Industrial") and fabricated by Industrial.

The original complaint in this matter was filed in October of 1995. On March 31, 1997 and after completion of written discovery and many depositions, an amended complaint was filed joining Superior and alleging that Superior was the Jones Act employer of St. Romain.

After additional discovery, a motion for summary judgment was filed by Superior claiming that plaintiff was not a Jones Act seaman. The motion was initially denied by the district court (App. B), who found that:

> Superior has not met its initial burden as mover in showing the absence of a genuine issue of material fact regarding "whether or not the vessels on which Plaintiff worked during his employment with Superior were under common ownership or control." (App. B, 11a).

Petitioners propounded extensive written discovery and were then permitted by the district court to obtain documents from all of the oil companies and boat companies still in existence, additional documents from Superior, the depositions of all available Superior offshore supervisors, its plug and abandon manager, and a second deposition of its president.

After submission of the memoranda, oral argument was granted on March 11, 1998 (App. E, 25a). The adverse decision of the district court was rendered on March 20, 1998 (App. C, 13a). Petitioners' motion for reconsideration and alternatively seeking a Rule 54(b) final judgment or to certify the matters for interlocutory appeal was denied on April 15, 1998 .

When the claims against Industrial Fabricators were settled, plaintiff moved for entry of final judgment. Final judgment (App. D, 24a) was entered on September 17, 1998. A timely notice of appeal was filed on October 1, 1998.

The Fifth Circuit affirmed the summary judgment on February 22, 2000 (App. A, 1a). Rehearing was not applied for.

REASONS FOR GRANTING THE WRIT

I.
THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT, THOSE OF OTHER CIRCUITS, AND DECISIONS OF THE SUPREME COURT AND COURTS OF APPEAL OF LOUISIANA

Chandris v. Latsis, 515 U.S. 347, 366, 115 S.Ct. 2712, at 2189; 132 L. Ed. 2d 314 (1995) recites the seaman-status test::

> Soon after *Robison*, the Fifth Circuit modified the test to allow seaman status for those workers who had the requisite connection with an "identifiable fleet" of vessels, a finite group of vessels under common ownership or control. *Braniff v. Jackson Avenue-Gretna Ferry, Inc.*, 280 F.2d 523, 528 (1960). See also *Barrett*, 781 F.2d at

1074; *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (CA5 1983), cert. denied, 464 U.S. 1069 (1984).[1]

Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 560, 137 L. Ed. 2d 800, 117 S. Ct. 1535, 1543 (1997) restricted the "identifiable fleet" requirement to work, as here, for a single employer on vessels commonly owned or controlled by that single employer.

Other courts of appeal have reached conclusions differing from the Fifth Circuit. *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 154 (3d Cir. 1998); *Foulk v. Donjon Marine Co., Inc.*, 144 F.3d 252 (3rd Cir. 1998); and *Fisher v. Nichols*, 81 F.3d 319, 323 (2d Cir. 1996).[2]

The courts of Louisiana, which now consider an increasing percentage of admiralty and maritime matters, have rejected the common ownership and control test as too restrictive when it would produce an obviously unfair result. *Wood v. Subsea In-*

---

[1] In arriving at its decision, the lower courts rejected the leading case on this issue, *Bertrand v. International Mooring & Marine, Inc.*, 1984 AMC 1740, 700 F.2d 240 (5 Cir. 1983), cert. denied, 464 U.S. 1069, 104 S.Ct. 974, 79 L.Ed.2d 212 (1984), noted with approval in Rosamond, Note, an Employer's Common Ownership or Control over Several Vessels Is Unnecessary for Recovery under the Jones Act, 8 Mar. L. 398 (1993) and discussed with approval in Morrison, The Fifth Circuit's Identifiable Fleet Requirement for Seaman Status under the Jones Act, 31 Willamette L. Rev. 53 (1995).

[2] Referenced unfavorably in *Papai*, 520 U.S. at 553.

ternational, Inc., 99-1320 (La.App. 4 Cir, 05/03/00); 2000 La. App. LEXIS 1074, *4-8 and *Wisner v. Professional Divers of New Orleans*, 98-1755 (La. 3/2/99), 731 So. 2d 200

II.
THE QUESTIONS ARE IMPORTANT

The district court, at oral argument, stated his understanding of the legal issues based on his understanding of the facts:

> Assuming that Superior utilizes, from time to time, various vessels for these services that they perform, as seems to not be in dispute, and assuming that Superior has a person on board the vessel and that person gives general instructions to the vessel captain as to where to go and what job we're going to perform, and assuming that the captain normally would follow those instructions unless they were something, they were instructions that endangered the safety of the vessel, is that the type of control that is necessary and does that type of vessel relationship, i.e., whatever vessel is either furnished with a contract to do a -- what are these, plug and abandon jobs?
>
> THE COURT: To do plug and abandon work which, as I understand, sometimes the contractor itself furnishes the vessel, sometimes in the contract price it allows Superior, Superior has to go out and hustle their own vessels some where and as I understand it that's not disputed, that's generally the way the vessels come into play and it's generally not disputed that Superior personnel tells the vessel, all right, we're going to locate such and such and here's what I want you to do and I want you to

back up because you have to be here, is that the type of control that is required and is that the type of relationship between Superior and the vessels enough to identify, to fit [4] the definition of an identifiable fleet of vessels. * * * * But I am interested that assuming that, I'll phrase it again, assuming that and you all tell me if there is any dispute as to this, as I understand it, during the period of time in question, whenever the job was working for Superior. Now I understand when he was injured he was actually on the platform, but during the period of time in question he was on various vessels, those vessels for about a dozen different jobs, as I recall, and those vessels came to Superior in different ways. Sometimes Superior contracted to do a job for someone and for that contract price Superior had to furnish the vessel. Sometimes Superior contracted to do a job for someone and for a different contract price they were furnished a vessel for Superior to use. The vessels all came with their own captain, own guy who drives the vessel and takes care of the engine. But there are Superior personnel on board the vessel and there is some Superior head honcho who is telling the vessel where to go, I want to go over here, now we are going to this well, I want you to come here, I want you to position your [5] vessel this way because we have to go to do this, and the captain is taking orders and indeed takes those orders unless someone would suggest he would do something unsafe. Now that type of vessel relationship between the plaintiff and the vessel and that type of control of Supe-

> rior personnel, does that amount to an identifiable fleet of vessels. [App. E, 25a-26a.][3]

The court of appeal specifically rejected the fact-based approach advocated by petitioners because "it would "involve the court in analyzing the day-to-day minutiae of a liftboat's operations." Rather it resorted to "developed workable standards for determining who qualifies as a seaman under the Jones Act" that ignore actual control in favor of an entirely arbitrary test that makes seaman's status depend entirely on whether or not the employer exercising actual control or his customer has had the forethought or legal advice to make certain that the written contractual documents, such as the charter party, do not reflect the reality of actual common control.

The test established by the court of appeal fails to "focus upon the essence of what it means to be a seaman and to eschew the temptation to create detailed tests to effectuate the congressional purpose, tests that tend to become ends in and of themselves." *Latsis*, 515 U.S. at 361, 115 S.Ct. at 2187. For the employer, it will be easy to predict who will be covered by the Jones Act before a particular workday begins because it will be determined by lawyer's advice on how to structure the charter party. For the maritime worker, his belief, as expressed in Mark St. Romain's affidavit, that he was assigned to a fleet of vessels under the actual common control of his employer, will be chimerical.

---

[3] Compare *Wood,* 2000 La. App. LEXIS 1074, at*5: "SubSea rejects Wood's hearsay testimony that the captains of third-party vessels were given instructions by SubSea as to where they wanted to go."

The rejection of the actual common-control test by the court of appeal also deviates from this Court's persistently expressed desire to provide Jones Act protection to those "who are exposed to the "special hazards" and "particular perils" characteristic of work on vessels at sea, . . ." *Latsis*, 515 U.S. at 369, 115 S.Ct. at 2191.[4]

III.
AN ACTUAL-CONTROL TEST WILL PRODUCE FAIR AND CONSISTENT RESULTS

A. The Test

When, as here, a maritime worker has admittedly spent more than the requisite thirty (30%) percent of his time working in connection with vessels,[5] so that the duration test is met, the second part of the test which should be applied by the fact finder is a multi-faceted one involving a sliding scale utilizing the following factors:

1. *Nature of the Maritime Employment:* This varies from traditional maritime employment, such as anchor handling and commercial diving, that are the most "salty," through marine construction and deconstruction that are not as traditional but

---

[4] St. Romain places great emphasis on his claim that in all his offshore assignments, whether he worked on the platforms or on the liftboats, he was regularly exposed to the "perils of the sea" faced by traditional seamen. We cannot agree. Whether St. Romain faced perils of the sea is not outcome determinative of seaman status. (footnote omitted), App. A, 6a.

[5] App. E, 25a.

can only be done offshore and with the use of vessels, and to speciality oil field services, such as wirelining, that were developed for onshore oil wells and simply moved offshore to be performed by service subcontractors.

2. *Exposure of the Employment to the Perils of the Sea:* This varies from blue water seaman's work on long voyages which admittedly exposes the seaman to the perils of the sea, through brown water work offshore involving less traditional vessels, or, as here, marine construction or deconstruction work done offshore by means of jack-up barges, to work done inland or inshore with no exposure to the perils of the sea.

3. *Employer's Actual Control over a Vessel or a Fleet of Vessels:* The factors vary from two or just a few more vessels co-owned by the seaman's employer, through actual and operational control but not ownership or a formal charter, and finally to neither *de facto* or *de jure* control nor common ownership of any vessels, or a large pool of owned vessels to which a land-based employee is randomly assigned.

B. Doctrinal and Jurisprudential Support for This Test

1. Nature of the Maritime Employment

So long as the duties of the seaman contribute to the mission of the vessel, which is not disputed here, there are few employments that are *ipso facto* disqualifying of seaman status.

2. The Cases Involving Itinerant Subcontractor Workers

Itinerant workers furnished by subcontractors seldom qualify for seaman status. *Langston v. Schlumberger Offshore Ser-*

vices, Inc., 809 F.2d 1192, 1193-94 (5th Cir. 1987), cited by the court of appeal, involved a wireliner who was an itinerant employees assigned randomly or by rotation to a large number of vessels (or platforms) as to which his employer had no other presence and no control whatsoever. "[T]he summary judgment evidence does not suggest that these vessels were commonly owned or **had any other nexus** that would support a finding that they were a fleet." Compare, *Adams v. Bill Laurence, Inc.*, 1999 U.S. Dist. LEXIS 270 (E.D. La. 1999), distinguishing *Langston* and other cases ("Wireline operators to whom this circuit has denied seaman status have one thing in common: they are itinerant workers, workers whose work is not essential to a particular vessel or fleet of vessels.") and denying the defendant's motion for summary judgment, because it was a question of fact whether the wireline work was essential to the work of the vessel, there a drilling barge, even though the injury was, as here, on a platform and not on a vessel.

Wireliners and other subcontractor employees are not generally considered to be seaman unless they work from their own vessels and use such special purpose vessels to travel to wells for specialized work. This provides them with a vessel to which they owe allegiance. Wireliners and sandblaster/painter foremen are more usually subcontractor employees to the oil drillers, workover contractors, etc., the general contractors to the oil companies and the companies in charge of the vessels being used to do the work. The employers of the itinerant workers have no control over or contractual relationship with the vessels to whom they randomly and usually briefly assign these workers. The situation as to employees of drilling and workover vessels is more analogous to that of St. Romain, because their employers are the general contractors who own the

vessels utilized for this work, if there is enough work of this kind, or who charter or otherwise control them if there is not or if the conditions of the work vary from job to job sufficiently so that chartering and not owning is more economical and permits the use of jack-ups with various capacities and attributes.

There is a conflict among the circuits in regard to pilots. In *Bach v. Trident Steamship Company*, 920 F.2d 322 (5th Cir. 1991), a case which has been criticized,[6] the size of the potential fleet, all randomly owned, was enormous, and the duration of the control was very brief.

3 Offshore Platform Construction, Refurbishing, and Deconstruction

There is no standard onshore work identical to offshore marine construction. Rather offshore construction differs from standard onshore construction work since it is done in a maritime location that requires the use of vessels and during which marine workers encounter the perils of the sea, just as do the crews of the vessels from which they work. Plug and abandon

---

[6] There was a strong dissent in the *Bach* case and it and its rationale have been uniformly and severely criticized by doctrinal writers. Robertson, Rubin: A Glimpse at His Contributions to the Law, 52 La. L. Rev. 1527, 1542-1546 and particularly notes 126-34 (1992) (characterized as a "startling phenomenon" and "a deplorable example of doctrinal rigidity." Wohlgenmuth, "Seaman" Status and the Jones Act: *Bach v. Trident Steamship*, 17 Mar. Law. 115 (1992). See Matison, Note: Compulsory River Pilots Granted Jones Act Status – Sounding the Death Knell of the "Fleet Doctine": *Evans v. United Arab Shipping Company*, 16 Mar. Law. 421 (1992).

work, which removes casing and drill pipe to a depth 30 feet beneath the mud line in varying depths of water, cannot, by definition, be done on land. Compare, *Ardoin v. J. Ray McDermott & Co.*, 641 F.2d 277 (5th Cir. 1981) (plaintiff attached to any one barge of a fleet of some half dozen McDermott barges and was customarily required to stay offshore for a minimum of ten (10) days unless the project was shorter and would customarily stay to the end of the project, up to thirty (30) days. Over the contention of McDermott that Ardoin was assigned to specific projects and not specific vessels, seaman status was held to be a jury question so that an adverse summary judgment was reversed.)

The plug and abandon work being done by Superior is maritime construction work, considered maritime in nature. *Ardoin*, 641 F.2d at 282; *Pederson v. Powell-Duffryn Terminals*, 34 F.Supp.2d 915, *10-11 (D.N.J. 1999) (underwater construction on the pilings of a pier); *Foulk*, 144 F.3d at 258-59 (artificial reef).

4. Importance of a Seagoing Occupation

Does the work takes a putative seaman to sea and involve exposure to perils of the sea or does the work simply involves shore-based maritime work and workers being transported to and fro or transiently working over water? *Foster v. SubSea International, Inc.*, 1998 U.S. Dist. LEXIS 11725, *9-10 (E.D. La. 1998). In *Papai*, 117 S.Ct. 1535, 1540 (1997), this Court mandated that the inquiry regarding the "nature of the employee's connection with the vessel must concentrate on whether the employee's duties take him to sea." See *Latsis*, 515 U.S. at 368, 115 S.Ct. 2172; *Wallace v. Oceaneering International*, 727 F.2d 427, 434 (5th Cir. 1984); Caffrey, Comment,

Splicing the Net: A Legislative Answer to the Problem of Seaman Status under the Jones Act, 14 Mar. Law. 361 (1990) and particularly 369-370; *Coulter v. Texaco*, 714 F.2d 467, 469 (5th Cir. 1983); Powell, Note: A New Highlight on an Old Doctrine and the Evaporation of the Fleet Rule: *Munguia v. Chevron U.S.A., Inc.*, 10 Mar. Law. 326 (1985) and particularly text at notes 70-84; Robertson, A New Approach to Determining Seaman Status, 64 Tex. L. Rev. 79 (1985).

C. Application of the Test to the Facts of This Case

1. Nature of the Maritime Employment:

Although admittedly not a traditional maritime duty dating from the days of sail and steam, plug and abandon work involves the cutting of drill pipe and casing from offshore stationary platforms 15 feet beneath the mudline of the Gulf of Mexico in water up to 200 feet in depth and the removal of that casing from there up to the surface, by the use of jack-up vessels and their cranes and crews. It is not oil field well work transposed from land to water but classic maritime construction work, part of the deconstruction or reconstruction of offshore marine structures, contractual undertakings not performable on land and having nothing to do with the actual production of oil.

To say, as did the district court, that the employment was insufficiently "salty" is to make a factual determination more appropriately left to the jury or other finder of fact after hearing all of the evidence. It is only in more clear-cut cases, such as those involving wireliners, *e.g. Langston*, that such a determination may be made as a matter of law.

2. Relationship of Superior to the Fleet of Vessels

Although the oil company was the ultimate customer and ultimately paid for the jack-up, its crew, and its supplies and contractual arrangements varied depending on the type of contract (time and materials or turn key), Superior chose the jack-ups based on capacity and suitability to the job. Suitability to the job included crane capacity, deck and work space, availability of quarters, and ability to work at the depth of water in which the platform was located.

While Superior characterized itself in its brief in the court of appeal as a subcontractor [pp. 27, 40, and text at n. 28], it was in fact the general contractor, with other service companies occasionally working for it, in its plug and abandonment and platform removal projects. The particular jack-up was chosen by Superior and was chosen to be at the service of Superior, at the disposal of Superior's contractual undertaking and its offshore supervisors, and at the service of Superior's men and equipment. When the job was completed or if more supplies were needed, the jack-up returned to shore with Superior's equipment and often with its men.

The cranes on the lift boats were an essential part of the ability of Superior to perform its contracts. The crane operator was employed by the lift boat company. Had the crane operator been injured during a Superior casing removal, he would certainly have been deemed a seaman, even though he was acting in essence as a member of the Superior plug and abandon team just as was St. Romain.

3. Nature of the Relationship of Superior and St. Romain to the Jack-Up Vessels

Although Superior owned none of the lift boats and chartered less than half with its customers chartering the rest. Superior had a verbal or written contract with each of the oil companies for plug and abandon work in connection with platform deconstruction that made it the general contractor. The time charters of the lift boats, whether by Superior or by its oil company customers, included the furnishing by the lift boat company of a captain and other employees, A member of the lift boat crew was also the crane operator.

Superior chose the lift boat needed on the particular job by choosing among a substantial number of available lift boats which could operate in different depths of water (deeper or shallower), which came equipped with one or two cranes of varying lifting capacity, housed various numbers of Superior and occasionally employees of Superior subcontractors, and had sufficient deck space on which to carry Superior equipment to the job and to work with and upon which set up the P & A work and equipment.

As correctly concluded by the district court, Superior personnel, on every job, told the lift boat where to locate. There was some "head honcho" from Superior who told the vessel where to go, what well to go to, where and how to position his vessel, so that the captain "is taking orders and indeed takes these orders unless someone would suggest that he do something unsafe." [App E, 25a-26a]

It was not until the Marathon job that Superior brought its own winch unit, which it had recently internally developed to extend its capacity to deeper and heavier jobs.

4. Application of the Actual Control Test

Although an actual-control test has been advocated by other courts and by distinguished commentators, the court of appeal was highly critical of the test as proposed by St. Romain. Under this test, "formalism . . . can have the simplistic effect of avoiding the application of the Jones Act," *Etheridge v. Subsea International, Inc.*, 806 F.Supp. 598, 602 (E.D. La. 1992), an intolerable result and one which results from the disapproved use of tests as ends in themselves.

As a threshold inquiry for seaman status, *Latsis* and *Papai* mandate intense factual scrutiny of the percentage of time that a maritime worker spends on vessels as compared to that spent onshore or on stationary platforms. While the court of appeal accepted Superior's suggestion that a similar inquiry into actual control would "mire the Court in an amorphous and open-ended inquiry" for each vessel into "minutiae. . .," the purpose of such an inquiry, rather than accepting form within the control of the employer over substance, is to produce a just result in which factual issues concerning true seaman go to the jury and the claims of itinerant marine workers are dismissed upon summary judgment.

What is the relationship between the employer and the marine construction job that is being performed with the essential assistance of a jack-up or other vessel? Is the employer the general contractor on and directing the job or is it a shore-based operation sending a specialized team of one or more

technicians to perform oil field service work? Has the employer chosen the vessel for its specific characteristics that make it suitable for the job? Is the vessel hired for the duration of the job or some substantial portion of the job? Does the employer's "head honcho" direct all aspects of the use of the lift boat and its crane other than the minutia of its navigation? Does the employee eat, sleep, and work on the vessel and call it home for the duration of the job? Does the employer's offshore supervisor tell the vessel when to come and go and where to position the vessel for the convenience of the job. In short and even though these vessels were not owned and may or may not have been chartered, did Superior exercise sufficient incidences of ownership, through actual control, for all of these vessels to have been under common control as a matter of law or fact?

The so-called minutiae so repugnant to the court of appeal are incidences of control ceded to Superior by the liftboat company and its captain that are analogous to the incidences of ownership that Superior would have if it had found it economically advantageous to own liftboats. The degree of synergy between maritime construction/demolition and the liftboats which facilitate shallower water work must overcome the formalism of ownership, or contractual arrangements or artificial distinctions will be made among litigants that have no relationship to attachment to a vessel, perils of the sea, or duties of the putative seaman. Such artificial distinctions provide inconsistent results and are intellectually arbitrary and unsatisfying to court and commentator alike.

CONCLUSION

St. Romain, through extensive discovery in the district court, established actual, *de facto*, control over the vessels on which he served that is sufficient to demonstrate, as a matter of law and certainly as a matter of disputed fact, that common control by Superior that would have constituted a fleet if Superior had owned this fleet of vessels. That Superior made a decision, in its own economic interest and contrary to industry norms, to not own jack-up barges but to use them as an owner would, should not be a fact material to the determination as to common control for fleet purposes. Otherwise an employer would be permitted to subvert the Jones Act requirements and escape liability by hiding behind the paper control, because:

> When a hurdle is inflexible, it will of course operate as planned and deny relief to those for whom it was never intended, but it will also provide glaring examples of the inequities that arise when the standard is applied to those who clearly deserve relief but somehow do not conform.[7]

Rather substance -- actual control -- should be recognized over formalistic and easily manipulated paper control that had nothing to do with the control legally necessary to make these vessels a fleet for Jones Act purposes.

---

[7] Wilson L. Maloz, III, RECENT DEVELOPMENT: Harbor Tug & Barge Co. v. Papai: The United States Supreme Court Takes a Fleeting Glance at Jones Act Seaman Status, 72 Tul. L. Rev. 2227, 2238 (June, 1998)

The Court should accept this opportunity to provide guidance to the lower courts and to the state courts in order resolve this reoccurring problem.

LAW OFFICES OF LOUIS R. KOERNER, JR.

By: _____

Louis R. Koerner, Jr. Bar #7817
1204 Jackson Avenue
New Orleans, Louisiana 70130-5130
Telephone: (504) 581-9569
Telecopier: (504) 566-0546
e-mail: louis@koerner-law.com

CERTIFICATE

Undersigned counsel of record certifies that a copy of the foregoing application for writ of certiorari has been sent to the following counsel on this 22nd day of May, 2000 by first class mail, properly addressed, to Superior Well Services, Inc. through its attorney, Christopher E. Carey, Montgomery, Barnett, Brown, Reed, Hammond & Mintz, LLP, 3200 Energy Centre, 1100 Poydras Street, New Orleans, LA 70163-3200.

_____
Louis R. Koerner, Jr.

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED FEBRUARY 22, 2000

MARK ST. ROMAIN and ANGELA ST. ROMAIN, Plaintiffs-Appellants, versus INDUSTRIAL FABRICATION AND REPAIR SERVICE, INC., ET AL., Defendants. SUPERIOR WELL SERVICE, INC., Defendant-Appellee.

No. 98-31081

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

203 F.3d 376; 2000 U.S. App. LEXIS 2512

February 22, 2000, Decided

COUNSEL: For MARK ST ROMAIN, ANGELA ST ROMAIN, Plaintiffs - Appellants: Louis R Koerner, Jr, Law Offices of Louis R Koerner, New Orleans, LA.

For SUPERIOR WELL SERVICE INC, Defendant - Appellee: Christopher E Carey, Montgomery, Barnett, Brown, Read, Hammond & Mintz, New Orleans, LA.

JUDGES: Before POLITZ, DAVIS, and STEWART, Circuit Judges.

OPINION: POLITZ, Circuit Judge:

Mark St. Romain and his wife Angela appeal an adverse summary judgment in their Jones Act action against Superior Well Service Inc. The district court concluded that St. Romain was not a seaman for purposes of the Jones Act. For the reasons assigned, we affirm.

BACKGROUND

This action arises out of an accident which occurred on an offshore platform, owned by Marathon Oil Company and permanently affixed to the Outer Continental Shelf off the coast of Louisiana. St. Romain was employed by Superior as a "plug and abandon" (p&a) helper from 1993 until the date of his ac-

cident in 1995. Plug and abandon work involves the decommissioning of oil wells under offshore platforms. Cement plugs are inserted into the wells beneath the ocean floor and the casing pipe is removed. Most of Superior's p&a work is done from fixed platforms. Other projects, including some of St. Romain's assignments, are performed partly from liftboats. A liftboat is a support vessel that uses a crane to pull the casing. The vessel transports Superior's equipment to the platforms, and provides the Superior crew with a place to eat and sleep. The p&a team usually remains at the platform until the job is complete. The work may extend from a few days to several weeks. Occasionally the liftboat also is used to transport Superior's p&a team to the platform.

On March 4, 1995, St. Romain was assisting in the removal of casing when a spreader bar used to lift the pipe failed and a shackle and sling struck his hard hat. St. Romain sought and received benefits under the Longshore and Harbor Workers' Compensation Act.[1] He initially sued the manufacturer of the spreader bar, later amending his complaint to assert a negligence claim against Superior, claiming status as a seaman under the Jones Act.[2] The district court granted Superior's motion for summary judgment, concluding that St. Romain did not qualify as a Jones Act seaman because he did not establish that he worked aboard an identifiable fleet of vessels. The district court also granted Superior's motion to strike St. Romain's second affidavit and the affidavit of his expert witness because they contained inadmissible legal conclusions and hearsay. The court also denied St. Romain's motion to strike the affidavit of Superior's president, Terence Hall, for lack of personal knowl-

---

[1] 33 U.S.C. § 901 et seq.

[2] 46 U.S.C. § 688(a).

edge, concluding that the affidavit was based on Hall's personal knowledge as president of the company. St. Romain timely appealed.

ANALYSIS

Jones Act:

We review de novo a district court's grant of summary judgment.[3] The determination whether an injured worker is a seaman under the Jones Act is a mixed question of law and fact.[4] As such, it is generally inappropriate to dispose of a seaman status claim on summary judgment.[5] Summary judgment is mandated, however, "where the facts and the law will reasonably support only one conclusion."[6] "Seaman" is not defined in the Jones Act; that task has been left to the courts. The Supreme Court announced a two-part test to determine seaman status:

---

[3] *Brown v. Forest Oil Corp.*, 29 F.3d 966 (5th Cir. 1994).

[4] *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 137 L. Ed. 2d 800, 117 S. Ct. 1535 (1997); *Bertrand v. Int'l Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983).

[5] *Harbor Tug*, 520 U.S. at 554; *Buras v. Commercial Testing & Eng'g Co.*, 736 F.2d 307 (5th Cir. 1984); *Bertrand*, 700 F.2d at 244.

[6] *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356, 112 L. Ed. 2d 866, 111 S. Ct. 807 (1991) (citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

> First . . . an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission . . . . Second . . . a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.[7]

We previously have defined "fleet" to mean "an identifiable group of vessels acting together or under one control."[8] Our review of the record herein leads to the inexorable conclusion that St. Romain is not a seaman as a matter of law.

It is undisputed that St. Romain was not permanently assigned to any one vessel in navigation. Rather, he contends that he was a member of the crews of the several liftboats used in the p&a jobs performed by Superior, and that these boats constitute an identifiable fleet of vessels.[9] Thus, the issue before

---

[7] *Harbor Tug*, 520 U.S. at 554 (quoting *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368, 132 L. Ed. 2d 314, 115 S. Ct. 2172 (1995)) (citations and internal quotation marks omitted).

[8] *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1074 (5th Cir. 1986) (footnote omitted).

[9] We note that no liftboat was being used by Superior on the job when St. Romain's injury occurred. Marathon's platform was affixed to the Outer Continental Shelf at a point where the ocean depth was over 400 feet, which is too deep for a liftboat operation. This fact is not material to our analysis, however, as seaman status must be determined by examining the claimant's overall employment-related connection to a vessel in navigation rather than focusing only on the facts at the time of injury. *Chandris*, 515 U.S. at 363; *Barrett*, 781 F.2d at 1075 (citing

the district court, and before this court, is whether St. Romain has produced sufficient evidence to create a genuine fact issue as to whether he had a substantial connection to a group of vessels acting together under common ownership or control. We must conclude that he has not done so.

The case at bar involves facts strikingly similar to those in *Hufnagel v. Omega Service Industries, Inc.*[10] In *Hufnagel*, we denied seaman status to a rigger, employed by an oilfield service company, injured on a fixed offshore platform while repairing the platform's pilings. Hufnagel claimed he was a member of the crew of the liftboat used to assist Omega in its platform repairs and therefore was entitled to seaman status.[11]

We held that Hufnagel did not qualify as a seaman because he could not establish a substantial connection to either a single vessel or to an identifiable fleet of vessels.[12] Throughout his employment Hufnagel had worked on twenty-six different offshore platforms owned by thirteen different Omega customers. We concluded that the support vessels which were used on some of Hufnagel's assignments did not qualify as a fleet because "[the vessels] were always different, provided by different customers, and owned and operated by different companies.

Longmire v. Sea Drilling Corp., 610 F.2d 1342 (5th Cir. 1980)).

[10] 182 F.3d 340 (5th Cir. 1999)

[11] *Id.* at 345.

[12] 182 F.3d at 347.

They were not subject to common ownership or control."[13]

Similarly, St. Romain did not work aboard vessels under common ownership or control. During his employment with Superior, St. Romain had eleven different offshore work assignments. He worked aboard liftboats owned by nine different companies and chartered by five different entities. Superior did not own any of the liftboats. Typically, they were chartered by the oil company that hired Superior to do the p&a work. On four occasions Superior chartered the liftboats for its customer. The deposition testimony and the written charter agreements reflect that the captain of the liftboat, and its owner, had at all times ultimate authority with respect to the navigation, management, and operation of the vessels. Consequently, viewing the facts in the light most favorable to St. Romain, as we are required to do in this summary judgment setting, we must conclude that they do not establish that the liftboats at issue commonly were controlled by any one single entity and, thus, there is no genuine issue herein necessitating a trial.[14] St. Romain is not a seaman.

---

[13] *Id.*

[14] See *e.g.*, *Coats v. Penrod Drilling Corp.*, 5 F.3d 877 (5th Cir. 1993) (denying seaman status to claimant as a matter of law because the vessels claimant worked aboard were not under common ownership or control); *Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322 (5th Cir. 1991) (ships navigated by compulsory pilot not a fleet merely because each vessel was under pilot's control at the time he navigated them); *Langston v. Schlumberger Offshore Serv., Inc.*, 809 F.2d 1192 (5th Cir. 1987) (wireline operator not a seaman where employee was assigned to fifteen different vessels owned by ten owners).

St. Romain urges us to take an expansive view of "control" of a vessel, relying heavily on our decision in *Bertrand v. Int'l Mooring & Marine Inc.*,[15] wherein we stated, "in light of the purposes of the Jones Act, we will not allow employers to deny Jones Act coverage to seamen by arrangements with third parties regarding the vessel's operation or by the manner in which work is assigned."[16] St. Romain contends that control over a group of vessels should not be determined by who owns or charters the vessels but, instead, should be determined by who supervises the practical operations aboard the vessels. St. Romain maintains that because Superior selected the particular liftboat needed to complete the work, directed the vessel's captain where to position the boat to facilitate the use of its crane, and Superior employees told the captain when to jack-up or down, Superior exercised "operational control" over the boats which should satisfy the common control requirement.

This reliance on *Bertrand* is misplaced. Our later decisions clearly reflect that the court in *Bertrand* was concerned with denying seaman status to anchorhandlers, traditional maritime workers, merely because of the contractual arrangements made by their employer.[17] Our decisions after *Bertrand* have reaf-

---

[15] 700 F.2d 240 (5th Cir. 1983) (reversing grant of summary judgment denying seaman status to anchorhandlers where vessels employees worked aboard were all used, but not owned or chartered by their employer).

[16] 700 F.2d at 245.

[17] *Buras*, 736 F.2d at 311 ("Our concern [in *Bertrand*] was to prevent the denial of Jones Act seaman status as a matter of law to those claimants who are engaged in traditional maritime

firmed the essential principle that to qualify as a seaman an employee must establish an attachment to a vessel or to an identifiable fleet of vessels.[18] We are not persuaded by the proposed operational control test. To accept that position would involve the court in analyzing the day-to-day minutiae of a liftboat's operations. This we decline to do and, rather, resort to developed workable standards for determining who qualifies as a seaman under the Jones Act. In doing so we must decline to depart from these established principles.

St. Romain places great emphasis on his claim that in all his offshore assignments, whether he worked on the platforms or on the liftboats, he was regularly exposed to the "perils of the sea" faced by traditional seamen. We cannot agree. Whether St. Romain faced perils of the sea is not outcome determinative of seaman status.[19] We must hold, therefore, that consistent with Hufnagel, St. Romain's seaman status claim fails as a matter of law and the district court properly granted summary

---

activity on a vessel or vessels comprising an identifiable fleet in every respect except common control or ownership.").

[18] 736 F.2d at 311 ("We [do not] believe that *Bertrand* rejected the identifiable or recognizable fleet requirement established by our prior cases. Rather, *Bertrand* must be read in light of the factual situation it involved.") (footnote omitted); *Bach*, 920 F.2d at 326 ("Dozens (perhaps hundreds) of seaman status cases have come before us, but we have never made an exception to the core requirement that the injured worker show attachment to a vessel or identifiable fleet of vessels.").

[19] *Chandris, Inc. v. Latsis*, 515 U.S. 347, 361, 132 L. Ed. 2d 314, 115 S. Ct. 2172 (1995) ("Seaman status is not coextensive with seaman's risks."); *Bach*, 920 F.2d at 325 (same).

judgment to Superior.

Evidentiary Rulings:

The district court granted Superior's Motion to Strike the affidavit of St. Romain's expert, Kenneth A. Kaigler, and the second affidavit by St. Romain to the extent that they contained inadmissible legal conclusions or hearsay. Additionally, the court denied St. Romain's Motion to Strike or Disregard the affidavit of Terence Hall, Superior's president, for lack of personal knowledge. We review these evidentiary rulings for an abuse of discretion. Where an affidavit is erroneously excluded, a reversal of summary judgment is not warranted if the error was harmless.

St. Romain's evidentiary challenges involve the inclusion or exclusion of certain facts related to the proposed operational control test. In light of our rejection of that test, we must conclude that any evidentiary errors, if any errors indeed were committed by the district court, necessarily were harmless.

The decision appealed is AFFIRMED.

APPENDIX B – MINUTE ENTRY OF THE UNITED STATES DISTRICT COURT, DATED FEBRUARY 2, 1999 AND ENTERED ON FEBRUARY 3, 1999

MARK ST. ROMAIN, ET AL VERSUS INDUSTRIAL FABRICATION AND REPAIR SERVICE, INC.

CIVIL ACTION NO. 95-3445 SECTION "D" (2)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

1997 U.S. Dist. LEXIS 14208

September 10, 1997, Filed; September 10, 1997, Entered

DISPOSITION: [*1] Superior's Motion for Summary Judgment DENIED.

COUNSEL: For MARK ST ROMAIN, ANGELA ST ROMAIN, plaintiffs: Louis Roy Koerner, Jr., Louis R. Koerner, Jr., Attorney at Law, Kenneth William Jacques, Kenneth W. Jacques, Attorney at Law, New Orleans, LA.

For INDUSTRIAL FABRICATION AND REPAIR SERVICE, INC., defendant: Frederick M. Stoller, Richard Todd Musgrave, McCloskey, Langenstein & Stoller, New Orleans, LA.

For INDUSTRIAL FABRICATION AND REPAIR SERVICE, INC., defendant: Edward Pressner Gothard, Edward P. Gothard, Attorney at Law, Metairie, LA.

For SUPERIOR WELL SERVICE, INC., defendant: Christopher E. Carey, Montgomery, Barnett, Brown, Read, Hammond & Mintz, New Orleans, LA.

For LOUISIANA WORKERS' COMPENSATION CORPORATION, intervenor-plaintiff: Joseph Michael Stiltner, Wall, Johnson, Stiltner, Patterson, Egan & Wilton, Baton Rouge, LA.

OPINION: Before the court is the "Motion for Summary Judgment" filed by Defendant, Superior Well Service, Inc. ("Superior"), who seeks dismissal of Plaintiff's Jones Act claim

against Superior. Defendant, Industrial Fabrication and Repair Service, Inc. ("Industrial"), and Plaintiff, Mark St. Romain, [*2] filed memoranda in opposition.[1] The motion, set for hearing on Wednesday, September 10, 1997, is before the court on briefs, without oral argument.

Having considered the memoranda of counsel and the applicable law, the court finds that Superior as not met its initial burden as mover in showing the absence of a genuine issue of material fact regarding "whether or not the vessels on which Plaintiff worked during his employment with Superior were under common ownership or control." Accordingly;

---

[1] On October 20, 1995, Plaintiff originally filed suit only against Industrial, who manufactured the spreader bar that allegedly struck Plaintiff while working as a "plug and abandon" worker on an offshore platform. (As a result of his alleged accident with the spreader bar, Plaintiff collected compensation benefits pursuant to the Longshore and Harborworkers' Compensation Act, *33 U.S.C. § 901,* et. seq.). However, on March 31, 1997, Plaintiff filed an Amended Complaint asserting a Jones Act claim against Superior.

[*3] IT IS ORDERED that Superior's Motion for Summary Judgment be and is hereby DENIED; however, Superior will be allowed to re-urge this motion with a proper showing that there is no evidence of common ownership or control of the vessels on which Plaintiff worked during his employment with Superior.

A. J. McNamara

APPENDIX C – OPINION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT DATED MARCH 20, 1998AND ENTERED ON MARCH 23, 1998

MARK ST. ROMAIN, ET AL VERSUS INDUSTRIAL FABRICATION AND REPAIR SERVICE, INC., ET AL
CIVIL ACTION NO: 95-3445 SECTION: "D"(2)
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA
1998 U.S. Dist. LEXIS 3734; 1998 AMC 1919
March 20, 1998, Filed; March 23, 1998, Entered
DISPOSITION: [*1] Defendant Superior's Motion for Summary Judgment GRANTED; Plaintiff's Motion to Strike or Disregard the Affidavit of Terence Hall DENIED in part; Defendant Superior's Motion to Strike Affidavits of Kenneth A. Kaigler and Mark St. Romain GRANTED in part.

COUNSEL: For MARK ST ROMAIN, ANGELA ST ROMAIN, plaintiffs: Louis Roy Koerner, Jr., Louis R. Koerner, Jr., Attorney at Law, Kenneth William Jacques, Kenneth W. Jacques, Attorney at Law, New Orleans, LA.

For INDUSTRIAL FABRICATION AND REPAIR SERVICE, INC., defendant: Frederick M. Stoller, Richard Todd Musgrave, McCloskey, Langenstein & Stoller, New Orleans, LA.

For INDUSTRIAL FABRICATION AND REPAIR SERVICE, INC., defendant: Edward Pressner Gothard, Edward P. Gothard, Attorney at Law, Metairie, LA.

For SUPERIOR WELL SERVICE, INC., defendant: Christopher E. Carey, Montgomery, Barnett, Brown, Read, Hammond & Mintz, New Orleans, LA.

For LOUISIANA WORKERS' COMPENSATION CORPORATION, intervenor-plaintiff: Patrick F. Robinson, Louisiana Workers' Compensation Corp., Baton Rouge, LA.

OPINION: Before the court are the following motions:

(1) the second Motion for Summary Judgment filed [*2] by Defendant, Superior Well Service, Inc. ("Superior"), and opposed by Plaintiff, Mark St. Romain,[1] and Defendant, Industrial Fabrication and Repair Service, Inc.;[2]

(2) Motion to Strike or Disregard the Affidavit of Terence Hall filed by Plaintiff and opposed by Superior; and

(3) Motion to Strike Affidavits of Kenneth A. Kaigler and Mark St. Romain filed by Superior and opposed by Plaintiff,

[*3]

The motions were set for hearing on Wednesday, March 11,

---

[1] Plaintiff's memorandum in opposition is 32 pages (exclusive of exhibits). However, Local Rule 7.8.1 sets forth a 25-page limit if prior permission of the court is not obtained to exceed this limit. Here, Plaintiffs counsel did not seek permission to exceed the 25-page limit. For future filings, Plaintiffs counsel is advised to follow Rule 7.8.1 or risk the court's refusal to consider pages which exceed the 25-page limit.

[2] Superior's first Motion for Summary Judgment was set for hearing on September 10, 1997, at which time the court denied the motion finding a genuine issue of material fact as to "whether or not the vessels on which Plaintiff worked during his employment with Superior were under common ownership or control." However, the court stated that Superior would be allowed to re-urge its motion with a proper showing that there is no evidence of common ownership or control of the subject vessels. (See Minute Entry, Doc. No. 55).

1998, on which date the court heard oral argument from counsel.[3] Now, having considered the memoranda and argument of counsel, together with the applicable law, the court rules.

I. Background

This matter arises out of an alleged accident which occurred on a fixed offshore platform owned by Marathon Oil Company, and permanently affixed to the Outer Continental Shelf off the coast of Louisiana. Plaintiff was an oil field hand assigned to a "plug and abandon" team employed by Superior. At the time of his alleged accident, Plaintiff was assisting in removing casing pipe from a well when a spreader bar being used to lift the casing pipe failed and a shackle and sling swung from the spreader bar and struck him on the left side of his hard hat. As a result of this alleged accident, Plaintiff applied for and received compensation benefits pursuant to the Longshoremen's [*4] and Harbor Workers' Compensation Act, 33 U.S.C., § 901 et seq.

Plaintiff initially filed this suit against Industrial Fabrication and Repair Service, the manufacturer of the spreader bar. He then amended his suit claiming that he was a Jones Act seaman and asserting a negligence claim against Superior.

Prior to the subject accident, Plaintiff worked as a Superior employee on fixed platforms and on or from lift boats owned by nine different companies with five different "job charterers":

(1) Plaintiff's first job for Superior No. 6323, was in July 1993 and involved the L/B POWER V, owned by Marine Asset

---

[3] The transcript of the oral argument has been filed into the record as Document No. 113.

ManagementCorporation and chartered by Conoco;

(2) Plaintiff's next job, in August 1993, was No. 6360 and involved the L/B PMS VI, which was owned by Platform Marine Service and chartered by Superior;

(3) Plaintiff's next job, in September through November, 1993, was No. 6385 and involved the L/B JIM SANDLIN, which was owned by Halliburton Company and chartered by Chevron; and the L/B POWER V owned by Marine Asset Management Corporation and chartered by Chevron;

(4) Plaintiff's next job, in December 1993, [*5] was No. 6414 and involved the L/B GULF ISLAND IX, which was owned by Trico Marine Assets, Inc. and chartered by Superior;

(5) Plaintiff's next job, in January 1994, was No. 6427 and involved the L/B CHRISTINE, for which Superior does not have the official number and which the U.S. Coast Guard could not identify, although Superior's records show the owner as Montco. The vessel was chartered by Chevron;

(6) Plaintiff's next job, in February 1994, was No. 6441 and involved the L/B PMS VI, owned by Platform Marine Service and chartered by Chevron;

(7) Plaintiff's next job, in June 1994, was No. 6486 and involved the L/B BOB McAMIS, owned by Halliburton Company and chartered by Chevron;

(8) Plaintiff's next job in June 1994, was No. 6488 and involved the L/B BLUESTREAK 6, which was owned by the Blue Streak/Dawg 29 Partnership and chartered by Chevron;

(9) Plaintiff's next job, in October, 1994, was No. 6541 and involved the L/B FRANK PURKEY, which was owned by Halliburton Company and chartered by Chevron;

(10) Plaintiff's next job, in December 1994, was No. 6561 and involved the [*6] L/B RAM VI, which was owned by Aires Marine Corporation and chartered by Superior;

(11) Plaintiff's next job was in December, 1994 and January, 1995, No. 6557 and involved the L/B BOB McAMIS, which was owned by Halliburton Company and chartered by Superior.

Of the four liftbarge jobs chartered by Superior, Job 6360 on the L/B PMS VI was under the control of Superior's customer's on-site representative for Rutherford; Job 6414 on the L/B GULF ISLAND IX had no customer representative; Job 6561 on the L/B RAM VI was under the control of Superior's customer's on-site representative for Texaco; and Job 6557 on the L/B BOB McAMIS had no customer representative. On the two jobs where there was no customer's representative on site, Superior's supervisors on the liftbarges were in daily contact with the customer's office representatives via telephone or radio. (See Superior's Exhibit E, Terrence Hall Affidavit, P 6).

Whenever Superior chartered a liftbarge, all costs associated with that charter were passed through to Superior's customer. Further, none of the crews on the liftbarges on which Plaintiff worked were hired by Superior. (See Superior's [*7] Exhibit E, Terrence Hall Affidavit, PP 8 & 9).

Superior now moves for summary judgment arguing that Plaintiff is not a "seaman" because the liftboats on which Plaintiff worked were not commonly owned or controlled. The court agrees finding that there are no genuine issues of material fact and Defendant is entitled to judgment as a matter of law.

II. Legal Analysis

To qualify as a Jones Act seaman, a maritime worker must be assigned to do or do substantial work on a vessel in navigation or on an "identifiable fleet of vessels".[4] *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067, 1074 (5th Cir. 1986). A fleet is "an identifiable group of vessels acting together or under one control." *Id.*[5]

[*8]

Here, Plaintiff was not assigned to and he did not do substantial work on any single vessel in navigation. Thus, the question before the court is whether Plaintiff can survive summary judgment by showing that there is a genuine issue of material fact as to whether he worked on an "identifiable group of

---

[4] To have seaman status, the plaintiff must also show that the work he performed assisted the vessel in accomplishing its mission or contributed to the function or maintenance of the vessel. *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 890 (5th Cir. 1993).

[5] The *Barrett* court rejected

> the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew and transitory maritime workers such as longshoremen is total obliterated.

Barrett, 781 F.2d at 1074.

vessels acting together or under one control." The court finds that Plaintiff has failed to make such a showing.

While working for Superior, Plaintiff worked on nine different vessels owned by seven different companies and chartered by five different entities. Thus, no single entity exercised control over the nine different liftbarges on which Plaintiff worked during his employment. Compare, *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 890 (5th Cir. 1993) (affirming summary judgment denying seaman status based on the determination that plaintiff worked on vessels which were not owned or controlled by his employer, but by customers of his employer, and thus plaintiff did not work on a fleet); *Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322, 324-25 (5th Cir. 1991) (vessels upon which plaintiff worked as a compulsory pilot was not a fleet just because each vessel [*9] was under plaintiff's control when he piloted it); *New v. Associated Painting Services, Inc.*, 863 F.2d 1205, 1208 (5th Cir. 1989) (affirming summary judgment denying seaman status because vessels plaintiff worked on as a sandblaster and painter were not under common ownership or control, but rather were owned by at least eight unrelated entities); *Langston v. Schlumberger Offshore Services*, 809 F.2d 1192, 1194 (5th Cir. 1987) (plaintiff who performed jobs for ten unrelated owners aboard fifteen different vessels was not a seaman).

Plaintiff argues that even though Superior did not own the vessels on which Plaintiff worked and did not charter all of these vessels, Superior nevertheless exercised "operational control" of these vessels to whatever extent the Superior personnel selected the liftboat, told the liftboat captain where to/move or position the liftboat to efficiently use the crane, what to do with the crane, and where to jack-up or down. Plaintiff maintains that such operational control is sufficient to classify the vessels as a fleet. The court disagrees and finds that Plaintiff's heavy

reliance on *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 [*10] (5th Cir. 1983) is misplaced.[6]

In *Bertrand*, the plaintiffs were members of an anchorhandling crew, employed by International Mooring & Marine (IMM), who were assigned to relocate a Tenneco drilling rig. IMM chose to borrow a vessel from Tenneco, Sand the vessel was then specifically outfitted for the mission and Tenneco was billed only for the services of the anchorhandling crew. Occasionally, however, IMM chartered vessels directly for their own use and billed the customer [*11] for the chartered vessel as well as for the services of the anchorhandling crew. *Id.* at 245.

Three of the plaintiffs were killed and one was injured in a car wreck while returning from the job. The district court granted summary judgment to the employer on the issue of seaman status, holding that although the employer does not have to be the ship owner in order to have Jones Act liability, the lack of a recognizable unit of vessels under either common ownership or control was fatal to the plaintiffs' claim.

The Fifth Circuit reversed the district court finding that "in light of the purposes of the Jones Act, we will not allow employers to deny Jones Act coverage to seaman by arrangements

---

[6] At oral argument, Defendant Superior submitted several Charter Agreements that were executed between Superior's customers and the liftboat companies and one Charter Agreement between Superior and a liftboat company. These contracts give control of operation, navigation and management to the liftboat owner. Such contractual language is obviously contrary to Plaintiff's contention that Superior exercised operational control. (These Charter Agreements have been filed into the record, in globo, attached to Minute Entry, Doc. No. 114).

with third parties regarding the vessel's operation or by the manner in which work is assigned." *Id.*

However, the Fifth Circuit later explained that:

> although *Bertrand* . . . expanded the concept of a fleet to encompass vessels used, but not owned or chartered, by the employer, we do not believe that it can fairly be read so broadly as to confer seaman status on every worker whose duties place him aboard a large number of randomly-owned and controlled vessels for short periods [*12] of time that aggregate to comprise a substantial portion of his working time, nor do we believe that *Bertrand* rejected the identifiable or recognizable fleet requirement established by our prior cases."

Buras v. Commercial Testing & Engineering Co., 736 F.2d 307, 311 (5th Cir. 1984).

"Rather, *Bertrand* must be read in light of the factual situation it involved." *Id.* In *Bertrand*, the Fifth Circuit was concerned "to prevent the denial of Jones Act seaman status as a matter of law to those claimants who are engaged in traditional maritime activity on vessel or vessels comprising a an identifiable fleet in every respect except common control or ownership." *Id.* The Bertrand claimants were, arguably, at least, "classical blue water" workers engaged in traditional maritime activities. *Id.*

Here, Plaintiff was an oil-field worker engaged in plug and abandoning jobs, an occupation much less salty than that of the anchorhandling claimants in *Bertrand*. In fact, plug and abandon work--unlike anchorhandling duties--is often performed in a non-vessel setting such as a platform. As previously noted, the accident made the subject of this action occurred [*13] while Plaintiff was performing a plug and abandon job on a

platform. Thus, the "fleet" requirement for seaman status remains viable in this case.

For over thirty years, this circuit has struggled to provides a workable test for distinguishing seaman from other maritime workers in maritime injury cases. . . .Dozens (perhaps hundreds) of seaman status cases have come before us, but we have never made an exception to the core requirement that the injured worker show attachment to a vessel or identifiable fleet of vessels.

Bach, 920 F.2d at 326.

In *Bach*, the Fifth Circuit declined to make an exception for a worker who had the duties and faced the risks of a traditional. seaman but who lacked the requisite vessel connection. The Bach court explained that to create such an exception "would include all sorts of workers we have previously excluded, . . . and would make our seaman test unnecessarily uncertain and ambiguous." *Id.*

Accordingly, this court now declines to find that Plaintiff St. Romain (who again was not a classical blue water worker) was attached to an "identifiable fleet of vessels" while employed by Superior, who assigned him to perform plug [*14] & abandon jobs on fixed platforms and, on less than a dozen occasions, on or from several unrelated liftboats. Because these liftboats worked independently of each other on various jobs over approximately two years, and were owned and charter-operated by different companies (Superior being among the various charterers), it cannot be said that they were "acting together or under one control." *Barrett*, 781 F.2d at 1074. Thus, Plaintiff is not a seaman under the Jones Act.

III. Conclusion

For the reasons set forth above,

IT IS ORDERED that Defendant Superior's Motion for Summary Judgment be and is hereby GRANTED;

IT IS FURTHER ORDERED that Plaintiff's Motion to Strike or Disregard the Affidavit of Terence Hall be and is hereby DENIED to the extent that those portions of Mr. Hall's Affidavit which the court relied on were based on Mr. Hall's personal knowledge as President of Superior;

IT IS FURTHER ORDERED Defendant Superior's Motion to Strike Affidavits of Kenneth A. Kaigler and Mark St. Romain be and is hereby GRANTED to the extent that these Affidavits contain legal conclusions or hearsay.

* * * *

A.J. McNamara

APPENDIX D – FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT DATED SEPTEMBER 16, 1998 AND ENTERED ON SEPTEMBER 17, 1998

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA
MARK ST. ROMAIN, ET AL VERSUS INDUSTRIAL FABRICATION AND REPAIR SERVICE, INC., ET AL
CIVIL ACTION NO: 95-3445 SECTION: "D"(2)

FINAL JUDGMENT

For the reasons assigned in the Court's opinion of March 20, 1998, (Doc. No. 115)

IT IS ORDERED, ADJUDGED, AND DECREED that the claims of Mark St. Romain and Angie St. Romain against Superior Well Service, Inc. be and the same are hereby dismissed with prejudice.

New Orleans, Louisiana, this 16th day of September, 1998.

/s/ A.J. McNamara

UNITED STATES DISTRICT JUDGE

DATE OF ENTRY SEP 17 1998

APPENDIX E –TRANSCRIPT OF HEARING ON MOTION OF SUPERIOR WELL SERVICE, INC. FOR SUMMARY JUDGMENT – MARCH 11, 1998

THE COURT: This is one of those rare cases where I ask for argument in a motion practice. But I am not interested in arguing everything you all agree to. There is a very narrow issue that I am interested in, and that is I am not interested in arguing about the affidavits, the two affidavits in question, I am not interested in argument concerning the percentages of time that someone may or may not have spent on vessels. What I am interested in is whether or not the -- I'll phrase it this way. Assuming that Superior utilizes, from time to time, various vessels for these services that they perform, as seems to not be in dispute, and assuming that Superior has a person on board the vessel and that person gives general instructions to the vessel captain as to where to go and what job we're going to perform, and assuming that the captain normally would follow those instructions unless they were something, they were instructions that endangered the safety of the vessel, is that the type of control that is necessary and does that type of vessel relationship, i.e., whatever vessel is either furnished with a contract to do a -- what are these, plug and abandon jobs?

MR. CAREY: Yes, sir.

THE COURT: To do plug and abandon work which, as I understand, sometimes the contractor itself furnishes the vessel, sometimes in the contract price it allows Superior, Superior has to go out and hustle their own vessels some where and as I understand it that's not disputed, that's generally the way the vessels come into play and it's generally not disputed that Superior personnel tells the vessel, all right, we're going to locate such and such and here's what I want you to do and I want you to back up because you have to be here, is that the type of control

that is required and is that the type of relationship between Superior and the vessels enough to identify, to fit [***4] the definition of an identifiable fleet of vessels. That's the narrow issue I am willing to hear whatever you all have to say. I realize I am telling you now and probably upset ting some whole big order of arguments you're planning on giving me and I really am not interested in the other stuff. If it was just all the other stuff, I wouldn't have had oral argument. But I am interested that assuming that, I'll phrase it again, assuming that and you all tell me if there is any dispute as to this, as I understand it, during the period of time in question, whenever the job was working for Superior. Now I understand when he was injured he was actually on the platform, but during the period of time in question he was on various vessels, those vessels for about a dozen different jobs, as I recall, and those vessels came to Superior in different ways. Sometimes Superior contract ed to do a job for someone and for that contract price Superior had to furnish the vessel. Sometimes Superior contracted to do a job for someone and for a different contract price they were furnished a vessel for Superior to use. The vessels all came with their own captain, own guy who drives the vessel and takes care of the engine. But there are Superior personnel on board the vessel and there is some Superior head honcho who is telling the vessel where to go, I want to go over here, now we are going to this well, I want you to come here, I want you to position your [***5] vessel this way because we have to go to do this, and the captain is taking orders and indeed takes those orders unless someone would suggest he would do something unsafe. Now that type of vessel relationship between the plaintiff and the vessel and that type of control of Superior personnel, does that amount to an identifiable fleet of vessels.

MR. CAREY: Your Honor, I am the movant on this issue and I would agree with you in your analysis of the basic facts in every respect as being agreed with the possible exception of the

way in which instructions were given to the liftboat captains. The testimony seems to have indicated that in some cases the Superior supervisor, who is the head honcho you're referring to, would give instructions to the captain. on some occasions those instructions would be routed through the company representative, if there was one on the job, that's the oil company representative for which the job was being done. In other words, the supervisor would say to the company man, you know, we're finished here, we're finished with our work, we need to go to our next location, whatever that is according to the written procedure and that would be communicated to the captain.

THE COURT: What you're suggesting is that in some cases it might be the company man, the company that hired Superior might determine what the next location is [***6] going to be. But you're not suggesting that the company man, once they got on location, that the company man took over from Superior's head honcho as far as the details of how we're going to do the plug and abandonment?

MR. CAREY: That's correct.

THE COURT: Does anybody want to be heard to cite me law or tell me why it ought to be the law, if it's not clear, that why this does or does not amount to an identifiable fleet of vessels which does or does not give rise to Jones Act Seaman Status?

MR. CAREY: I would be happy to, Your Honor.

THE COURT: All right.

MR. CAREY: Judge, as you have very clearly narrowed the issue, the question comes down to whether control of a vessel for purposes of identifying a fleet is equal to the party who charters the vessel, or is equal to this sort of operational control analysis that you have referred to that the plaintiff suggests. It's

our position that the cases that have come out of the Fifth Circuit and to some extent, lesser extent, out of the United States Supreme Court, supports the view that the charterer of a vessel is the party that controls the vessel. The cases that we have cited, Braniff, Barret and Papai use the general phase "common ownership or control." Obviously, ownership is self evident and self proven. Control should [***7] be self evident and self proven too because the court is obviously looking for a clear and relatively easily established test on this issue of fleet status.

The cases that have interpreted this that we cited the court are primarily Bach and Coats, as well as New, Ardleigh, Langston, Lirrette, Miller and Guidry, all support the view that where a group of vessels are not owned by a single group and are not chartered by a single group or entity, then the vessel status, excuse me, fleet status does not exist.

Now you have to ask the question, I think, then why does the Fifth Circuit seem to favor this chartering approach as opposed to some other approach. And I would suggest to you that it's for two essential reasons. First of all, it's logical. If a vessel is not being operated by its owner, that is, if the owner is not the one telling the vessel, okay, you're going to go on this job and you're going to carry these contractors and going to do these wells, then the vessel is getting those instructions from the charterer, whoever is responsible for the job that is being done. So the charterer stands in the shoes of the owner.

THE COURT: When you used the word "charterer" in this case, who is the charterer?

MR. CAREY: Well there are various charterers, [***8] Your Honor. In some cases the vessels were chartered by Superior. In other cases, they were chartered by the customers that Superior was working for, such as Chevron or Texaco or Anadarko.

There were various companies that chartered these vessels.

THE COURT: In each case, as I understand it, in no case are the vessels crewed by Superior personnel, is that correct?

MR. CAREY: That's correct. In some cases, as you identified, in the cases where Superior's customer, the company for whom Superior was doing the work, in the cases where that customer supplied the vessel that you referred to before, in those cases the customer was the charterer of the vessel and there are various customers that were involved in these different jobs. In the cases where Superior provided the vessel, then Superior chartered the vessel from the vessel owner. So you have got two different kinds of situations.

THE COURT: You're choosing the word "charter" in the time charter context?

MR. CAREY: Yes, sir, that's correct. And, essentially, the charterer would then be the person who would say to the boat captain, okay, you're going to go to generally this area, you're going to carry this contractor or contractors on your liftboat and you're going to do this [***9] work and we're going to tell how long you're going to remain on that job. It's the charterer who hires the boat, the charterer gives those job assignments and it's the charterer who decides how long a vessel is going to remain on that task.

As an example of this, Your Honor, and I suggest to you that this illustrates how plaintiff's view is incorrect. If you take the example of one of the cases where Superior's customer provided the liftboat, such as anyone of the Chevron jobs, so Chevron charters this boat and they say, okay, boat owner you're going to be taking Superior as the contractor out to do P&A jobs in this area on a group of wells as per our written procedure and, you know, provide them with the assistance that

they need. Let's say that they go out there and they're out there for several days and the Superior supervisor on the P&A crew develops a personality conflict with the captain on the liftboat, gets made, and the Superior supervisor says, okay, captain, jack this boat down, take us in, you're off this job. well, after the liftboat captain stops laughing at him, he is going to call his office and he is going to say, I thought this boat was chartered by Chevron, how is it that the contractor, who is a passenger on my boat, is telling me I am off the job. And then they are going to call Chevron and Chevron is going to make a decision as to whether the boat is going to stay on [***10] the job or not. I would suggest to Your Honor that that is control and that is the control that the Fifth Circuit and the United States Supreme Court is talking about in the Braniff, Barret, and Papai line of cases. Another reason that this is logical is that the identity of the charterer is an easy thing to establish, you just look at the charter party, the time charter, and you find out who it is that has chartered the vessel for each one of these jobs. And then you can find out who is in control of the vessel for those times. The other reason that, I think, that the court, the Fifth Circuit has adopted this chartering approach is because it provides a very simple two part test that we outlined in our memorandum. Now the court has never enunciated this test or articulated it in any case that we have seen, but it seems a logical approach that the court takes is to say were the vessels that the man worked on commonly owned. If they were commonly owned, then there could be a basis for finding that there is a fleet, summary judgment is not appropriate. If they were not commonly owned, if they were not commonly owned, then you look at who chartered the vessels. If they were commonly chartered, then you can find that there was a fleet and summary judgment is not appropriate. But if they were not commonly owned and they were not commonly chartered, then as a matter of law the cases have found that a fleet [***11] did not exist. So you have got a simple two part test. Now, of course, the

problem with that, from the plaintiff's standpoint, is if you apply that approach that the Fifth Circuit has applied apparently in these cases that we have cited, it would require dismissal of the plaintiff's claim. So the plaintiff has come with its own test, this operational control approach. And that is going into these multitudinous details about when the boat jacked up, when it backed up, when it jacked down, how long it preloaded, who said what to whom, who told who to do what on each vessel on each job, to go through that for each plaintiff who is suggesting that he was a Jones Act Seaman. This kind of approach, Your Honor, is the same type of thing that was attempted in the Bach v. Trident case. And that case, as you recall, there was a compulsory river pilot who had a heart attack when he was on one of the vessels that he was piloting on the Mississippi River. And although this issue was not raised in the District Court, in the Fifth Circuit the man's Jones Act status was addressed by the Court and the plaintiff tried to make the argument that because the pilot was the person who is exercising that kind of operational control over each one of these vessels, that he is deciding when the vessel was going to stop, how far it was going to go, when it was going to turn and so forth, when they are going to drop the anchors, the plaintiff tried to [***12] suggest that that kind of operational control over each of these vessels that this man worked on created a fleet. And the Fifth Circuit rejected that. The Fifth Circuit said we're not going to look at that because they said it would be difficult to apply and would unnecessarily inject uncertainty and ambiguity into our circuit's test for seaman status.

What the court is looking for is a clear and rational way to decide whether you have got a fleet or not, whether who is exercising control over these vessels. And I would suggest to Your Honor that the way that we have suggested, that the approach that we have set forth is the one that the court has been using all this time, although it has never been clearly articulated.

Now no case, no case has ever held that the operational control approach that the plaintiff is urging here is the law. No case has ever said that. And plaintiff has not tried to cite a case because there isn't any. There is no authority for that at all. The plaintiff's reliance in this case on the *Bertrand* case is misplaced, Your Honor, and there are several reasons for that. Even Bertrand, by the way, does not support this operational control theory that the plaintiff has come up with.

First of all, the court should note that *Bertrand* was limited to its facts by the later Fifth Circuit case of [***13] *Buras* that we cited the court in our reply memorandum. *Bertrand* was a very unusual set of facts. You had some men who were working on an anchor handling vessel that their employer had borrowed from its customer, Tenneco. The vessel was specially outfitted for this anchor handling job. And during the period when the men were not working on the vessel, they were involved in an automobile accident and some people were killed. And in that case, the court, the real holding of that case was that the plaintiff's employer need not be the owner of the vessels, of all the vessels on which the individuals worked in order for the fleet to exist. Those vessels may be owned or controlled by some other single entity. But the employer need not be the entity that owns or controls those vessels. That's what *Bertrand* really held. But if you look at *Bertrand* carefully, what the opinion really focuses on is the fact that these men were all engaged in traditional maritime activity, anchor handling. You couldn't have a more traditional maritime activity. And in that case they were all working on a true vessel. You're not talking one of these movable work platforms like a liftboat that we have here. An anchor handling vessel that had been specially outfitted for the job that they were involved with.

THE COURT: Didn't the court suggest that if their duties were not so "salty", if you will, that maybe [***14]the result would

be different? I think that's Footnote 13, as I recall.

MR. CAREY: Yes, sir, the court found, I believe, in that case that where you had nontraditional maritime activities. I think this was in the Buras case, actually, Your Honor. Judge Brown wrote that where you have got an offshore oil field worker, because the work that those people do is really traditionally land based work that has been transposed into a maritime setting, that the court should use heightened scrutiny in determining whether or not they had the requisite attachment to a vessel or identifiable fleet, and the court focused very closely on this traditional maritime activity thing and put a lot of emphasis on it, Your Honor. And I would point out in that regard too, that Mr. St. Romain was not involved in that kind of activity. He was an offshore oilfield worker illustrated by the fact that he was doing exactly the same job that he supposedly did from these liftboats on the fixed platform at the time that he had been injured and had been doing it for several months at the time he was injured. So his work was not intrinsically involved in any vessel operations. He was never a member of the crew of any of these liftboats that he worked on.

As you pointed out, those liftboats all came with their own crews, they came with their own captain, their own [***15]engineers, their own cooks, their own deckhands. Those P&A workers were passengers on those liftboats. It was really that simple. They didn't do any work that related to the operation of the liftboat.

Now, Your Honor, I would point out just quickly that, and I don't know whether you want me to go into this, but the other cases that the plaintiff has cited and, I think, we pointed this out in our memo, are clearly distinguish able. The Wallace, Ardoin, Patton-Tull and Pickle cases or all distinguishable from this case. And Wallace, it was a diver case and, again, the

court focused on this traditional maritime activity question. And, actually, it was in the Wallace case that they talked about the heightened scrutiny and for offshore oilfield workers and whether or not a fleet existed. In Ardoin, the problem that you have there is that all the vessels were owned by the plaintiff's employer. There is no question there that there was a fleet. Same thing existed in the Patton-Tull case, all the vessels were owned by the plaintiff's employer, so they all satisfied the first aspect of the fleet test. And in Pickle, it was another diver case. Again, the court focused on the traditional maritime activity that the plaintiff was involved in. They performed an analysis of the percentage of time that he worked on various vessels and the court didn't even address the definition of fleet or the issue of common control, it [***16] wasn't even part of that case. So that opinion really has nothing to do with this case, Your Honor. And finally, Your Honor, I would suggest to you that despite the fact that there is absolutely no authority in the Fifth Circuit or anywhere else that we're aware of for this operational control approach that the plaintiff has suggested. There were specific contracts, master charterer contracts that were executed between Superior and the liftboat companies, or Superior's customers and the liftboat companies. And those contracts -- and I have copies of them here, Your Honor. We didn't address this in our reply memorandum because of the -- we didn't want to go over the limitations. But these were all produced in response to the plaintiff's discovery and these contracts, Your Honor, indicate -- well, state who was going to have operational control over each of these vessels while they're involved in these jobs. There was a contract between Aries Marine and Texaco, Texaco being one of Superior's customers. And that contract said that the owner, that is Aries, Aries Marine, shall have exclusive control over operation, navigation and management of the liftboat. And if Texaco overruled Aries, all responsibilities for decisions made at that point would fall on Texaco. There was another contract be-

tween Power Offshore, another one of the boat owners. And Conoco, another one of Superior's customers. And that contract said [***17] that the owner shall have responsibility for management, maintenance, and operation of the vessel and the master shall carry out his duties as required by the charterer, that is Conoco, and shall render all customary assistance to the charterer in the conduct of its operations with the vessel's crew and equipment and that the master shall be in full control of the vessel and its crew. Again, the owner is the one maintaining control. You have the same thing with the contract between Power Offshore and Superior, responsibility for the management, navigation and operation of the vessel shall remain with the company, that being Power Offshore. And Chevron had a form contract that it used with various liftboat companies. The ones relating to Blue Streak, Power Offshore, Montco, Platform Marine and Halliburton, were produced in response to plaintiff's discovery request and that contract says, "full responsibility for the management, operation, and navigation of the vessel shall at all times be and remain fully and in every respect that of the owner, the same as when trading for owner's account." So in each one of those cases, whether the vessel was chartered by Superior or was chartered by Superior's customer, using the plaintiff's approach, using this operational control approach, the contracts between the parties were such that the owner was going to have operational control, was going to retain operational control [***18] over each one of the vessels. As I say, I don't think that that's the approach that the Fifth Circuit has ever used or any other court has ever used. I think it's one of plaintiffs inventions. I think it's interesting, it's unique, but it's not the law. And even if you use that approach, Your Honor, that they suggested, the contracts make it clear that the individual owners of the vessels were the ones who were going to retain control. The only other thing that I would point out, Your Honor, is that we did cite the Borne v. Vintage Petroleum, which is a District case out of the Southern District of

Texas, and we cited that for two reasons. First of all, to illustrate that Mr. St. Romain was in the vein of a passenger on these liftboats. And Borne has made it clear, 1 think, upholding Munguia out of the Fifth Circuit, that people who ride as passengers on vessels are not seaman.

THE COURT: Well, yes, I mean, that's not new law.

MR. CAREY: Right.

THE COURT: I am not sure I agree with you as to Mr. St. Romain that you properly classify him as just a passenger. That may be a stretch. But let me hear what your opponent says.

MR. CAREY: Thank you, Your Honor. These are copies of the contracts that I referred to.

THE COURT: Pam, I am going to want those filed [***19] with the memos.

MR. KOERNER: Is the court familiar with this new Manuel v. P. A. W. Drilling Company case that came out on March the 2nd, Fifth Circuit?

THE COURT: Yes. Came out yesterday?

MR. KOERNER: Well, came out again yesterday. I think they must have revised it.

THE COURT: There was a case that came out yesterday with P & A Operation, with a plug and abandon operation. Is that the one you're talking about?

MR. KOERNER: Yeah, it came out originally on March the 2nd and then they revised it a little bit on the internet yesterday

THE COURT: I don't recall the name of the case. There was a

case that came out, the slip opinion came in yesterday dated March 2nd, which happened to deal with seaman status in a plug and abandonment operation but the facts had nothing to do with this case.

MR. KOERNER: Oh, I agree. The only thing I thought was interesting is that clearly this kind of -

THE COURT: All they said was it was a vessel.

MR. KOERNER: Yes. In other words, I realize that that has been a very gentle contention by my opponent but, I think, that that puts it to bed.

THE COURT: I don't see that as an issue in the [***20] case, whether the things that the man worked on were vessels and they weren't just work platforms. I am not there. I am to the narrow point that I raised. That case clearly says that in that case, and those vessels, that they were vessels, but I don't see that as a serious contention in this case.

MR. KOERNER: I think the main guidelines in this case is Bertrand. And Bertrand has been cited over and over again, including in one of the last two Supreme Court cases, either Latsis or Papai, they cited Bertrand with approval. Bertrand basically says we're not going to eliminate seaman status just because your boss made a contract that says something different. We're going to look at it from a practical standpoint.

If you took the test advocated by Superior, then every contract would provide -- the plug and abandonment company would never charter the boat, it would always be chartered by the oil company and there would be contractual provisions that said in all cases the owner of the vessel had all the control. But that's -

THE COURT: I am not concerned so much about the contracts.

But you haven't addressed the first part o counsel's argument about show me a case where they found seaman status where they found the identifiable fleet of vessels where the vessels were neither owned nor chartered [***21] by the same party.

MR. KOERNER: Bertrand -

THE COURT: Well it was not owned, as I recall in Bertrand.

MR. KOERNER: It's not chartered either. In other words, what happened in that case -

THE COURT: Wait. With Bertrand, were all of the vessels neither owned or chartered, is that correct? Is that what you're telling me?

MR. KOERNER: The vessel that the man was injured on -

THE COURT: No, I am asking in Bertrand, when we're looking at all of the vessels, you're telling me they were all owned and chartered by the same entity?

MR. KOERNER: No. My recollection of Bertrand is that the defendant, IMM, in the case owned vessels, anchor handling vessels

THE COURT: You're not answering my question.

MR. KOERNER: In this particular case -

THE COURT: No, see if you can answer my question. If you can't, just tell me, don't let me sit here listening for an answer that you're not going to give me. I am asking you, do you know of any case in which, be it Bertrand or any other one, in which the vessels involved that we were looking at to determine

whether it was an [***22] identifiable fleet of vessels, that they found seaman status where either, either one of the two, either they were not owned by the same person or chartered. In other words, is there any case where they found seaman status not withstanding the fact that the vessels that were being questioned were neither owned nor chartered by the same entity, do you know of any such case?

MR. KOERNER: I don't think in Bertrand that the vessel was either owned or chartered. It was a loan, is the way they called it, to IMM. That's the closest case that there is. There isn't any other case that talks about it. In other words, all the other cases that I cited talked about control, and they were as close as the existing jurisprudence is. And each of those cases has some distinguishable feature. And the closest case that I know of that I was able to find was Bertrand.

THE COURT: So Bertrand is your case.

MR. KOERNER: Exactly. And Bertrand basically is the best case I have and that particular case, they look to the reality of the situation as opposed to any objective tests such as a contract. And in our case, I devoted a whole factual section to the fact that who chartered the vessel didn't make any difference. In one of the situations, Aries Marine, where they had a contract, a general charter agreement with Texaco, as a matter of fact Superior [***23] chartered the vessel and the people looked to Superior for everything. Yeah, that's basically argument. I mean, I can't do any better than Bertrand. I think Bertrand is the main guidelines that the court has got in order to make a decision in this case.

THE COURT: Thank you very much. You have anything else you want to say?

MR. CAREY: No, Your Honor. I think we have already addressed the Bertrand case.

THE COURT: I am going to take it under advisement and I will rule shortly after. I want to write something when I rule. Thank you. We stand at recess. (End of motion)